No. 93-141

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WEST LYNN CREAMERY, INC., and
LECOMTE'S DAIRY, INC.,
Petitioners,

v.

JONATHAN HEALY, COMMISSIONER OF THE
MASSACHUSETTS DEPARTMENT OF
FOOD AND AGRICULTURE

On Writ of Certiorari to the Supreme Judicial Court of Massachusetts

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BRIEF OF THE MILK INDUSTRY FOUNDATION AND THE FOOD MARKETING INSTITUTE AS AMICI CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether a Massachusetts milk pricing order that requires milk processors to pay a premium on all fluid milk sold in Massachusetts, including milk purchased from out-of-state dairy farmers, and provides for distribution of the premium solely to Massachusetts dairy farmers, is invalid under the Commerce Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

Page

Constitution, statutes and regulations:

Miscellaneous:

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INTEREST OF AMICI CURIAE

The Milk Industry Foundation ("MIF") is the national trade association of processors of fluid milk and fluid milk products. MIF has more than 200 members, including milk processors in all 50 States. MIF members process nearly 80% of all fluid milk and fluid milk products sold in the United States. Many MIF members purchase raw milk from dairy farmers in one State and resell fluid milk and fluid milk products in another State. MIF and its members thus share a strong interest in preventing the States from erecting barriers to interstate sales of raw milk.

The Food Marketing Institute ("FMI") is a nonprofit association that conducts programs in research, education, industry relations, and public affairs on behalf of its 1,500 members—food retailers and wholesalers and their customers in the United States and around the world. FMI's domestic member companies operate approximately 19,000 retail food stores with a combined annual sales volume of $190 billion—more than half of all grocery store sales in the United States. FMI's retail membership is composed of large multi-store chains, small regional firms, and independent supermarkets. The supermarket serves as the purchasing agent of the consumer. As such, FMI has a strong interest in preserving choices and vigorous competition throughout the entire food chain on behalf of its supermarket members and the customers they serve—the American consumer.

The Court's decision in this case is likely to have effects well beyond Massachusetts. If Massachusetts succeeds in building a protective wall around its dairy industry, other States will follow its example. Indeed, at least three other States already have attempted to erect similar barriers to competition from out-of-state dairy farmers. *See Marigold Foods, Inc.* v. *Redalen,* Civ. No. 4-92-1084 (D. Minn. Oct. 20, 1993) (Minnesota); *Marigold Foods, Inc.* v. *Redalen,* 809 F. Supp. 714 (D. Minn. 1992) (same); *Farmland Dairies* v. *McGuire,* 789 F. Supp. 1243 (S.D.N.Y. 1992) (New York); *Cumberland Farms, Inc.* v. *Lafaver,* Civ. No. 92-70-P-H (D. Me. Aug. 3, 1993) (Maine).

STATEMENT

1. *The Federal Milk Marketing Order System.* Since 1937, the price of raw milk has been regulated by the federal government under the Agricultural Marketing Agreement Act of 1937 ("AMAA"), as amended, 7 U.S.C. § 608c (1988 & Supp. IV 1992). *See generally Lehigh Valley Coop. Farmers, Inc.* v. *United States,* 370 U.S. 76, 78-81 (1962). Pursuant to the AMAA, the

Secretary of Agriculture has promulgated regulations establishing a series of milk marketing areas, each governed by a separate Federal Order. Federal Order 1 applies to Connecticut, nearly all of Massachusetts and Rhode Island, and portions of New Hampshire and Vermont. *See* 7 C.F.R. § 1001.2 (1993).

Each Federal Order establishes, *inter alia,* minimum prices that regulated milk processors (such as petitioners) must pay dairy farmers for raw milk.[1] The Secretary's price regulations classify milk according to its use. 7 U.S.C. § 608c(5)(A). Federal Order 1 establishes four classes of utilization: Class I includes primarily bottled milk; Class II includes soft milk products such as ice cream, yogurt, and cottage cheese; Class III includes butter and certain hard cheeses; and Class III-A includes nonfat dry milk. 7 C.F.R. § 1001.40. The federal regulations set a minimum price for each class of utilization. The highest price is assigned to Class I; the lowest price usually is assigned to Class III-A.[2]

Each regulated processor must pay a minimum price based on its utilization of raw milk. For example, if the

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[1] Milk processors (sometimes referred to as "dealers") pasteurize, process, and package fluid milk and milk products. Dairy farmers are sometimes referred to as "milk producers."

[2] The Secretary determines a "basic formula price" based on a statistical sampling of prices paid by unregulated milk processors in Minnesota and Wisconsin to producers of Grade B milk. *See* 7 C.F.R. § 1001.51(a). This statistical sampling is known as the Minnesota-Wisconsin ("M-W") Price Series. The basic formula price (also known as the "M-W price") is determined each month and expressed in terms of a price per hundred pounds of milk ("hundredweight" or "cwt"). *See id.* § 1001.51. The Class III price is the M-W price, subject to specified adjustments. *Id.* § 1001.50(c). The Class II price is the Class III price plus approximately $.10/cwt, again subject to specified adjustments. *Id.* § 1001.50(b). The Class I price is determined by adding a "fixed differential" to the M-W price for the second preceding month. (Thus, the Class I price for April is based on the M-W price for February.) Under Federal Order 1, the Class I differential is $2.52. *Id.* § 1001.50(a).

processor sells only fluid milk products, it must pay at least the Class I minimum price for all its milk. If the processor uses 75% of the raw milk for fluid milk products and 25% for ice cream, it must pay the Class I minimum price for 75% of its milk and the Class II price for 25% of its milk.

Although the minimum price paid by the processor depends on its use of the raw milk, each dairy farmer subject to Federal Order 1 is entitled to receive a uniform minimum price for milk regardless of the use that is made of the farmer's milk. This result is achieved by pooling the proceeds of milk sales to all processors subject to the Federal Order and distributing the proceeds to dairy farmers according to a weighted average or "blend" price. *See* 7 U.S.C. § 608c(5)(B)(ii).

The Federal Milk Marketing Order System does not displace price competition among dairy farmers at price levels above the federal minimum price. If a regulated processor pays a dairy farmer more than the federal minimum price for raw milk, the dairy farmer keeps the difference—known as an "over-order premium"—between the actual price and the federal minimum price. Over-order premiums are not pooled or shared with other farmers. According to statistics published by the United States Department of Agriculture, sales to Class I processors in Massachusetts have commanded over-order premiums in recent years. *See* U.S. Dep't of Agric., Agric. Mktg. Serv., Dairy Div., *Dairy Market News* (Dec. 1992-Nov. 1993).

2. *The Massachusetts Pricing Order.* On February 26, 1992, respondent, acting pursuant to Massachusetts General Laws Chapter 94A, §§ 10-12, issued the amended Pricing Order at issue in this case.[3] The preamble to the

[3] The February 26, 1992, Order amended an Order of February 18, 1992. Respondent stated that the amended Order was issued "for technical, clarification purposes." Pet. App. A50.

Order states that "[t]he purpose of this Order is to provide an immediate interim solution to the state of emergency facing the Massachusetts dairy industry." Pet. App. A41. The preamble continues:

> This Order sets a target minimum price to be paid by milk dealers to Massachusetts producers, above the federally established minimum milk price. The terms and conditions of the Order take into consideration the regional nature of the flow of milk, as well as the amount necessary for all sectors of the industry to yield a reasonable return on their product.

Id.

The Order requires processors (referred to as "dealers" in the Order) to pay a premium (the "Massachusetts premium") to Massachusetts dairy farmers for Class I milk. The Massachusetts premium is one-third of the difference between the "Massachusetts target price" ($15/cwt) and the federal blend price for the second preceding month. The Order requires all milk processors to pay the Massachusetts premium into a "Pricing Order Fund." A processor's required monthly payment to the Fund is the Massachusetts premium multiplied by its sales of Class I milk for consumption in Massachusetts. The Order applies both to Massachusetts processors and to out-of-state processors that sell Class I milk in Massachusetts. Processors must pay the Massachusetts premium without regard to whether they purchase milk from Massachusetts dairy farmers or from out-of-state dairy farmers. Pet. App. A43-A45.

The Order provides that the Massachusetts premium will be distributed solely to Massachusetts dairy farmers. The premium is distributed under a formula designed to ensure that Massachusetts farmers receive a minimum price of $15/cwt for their milk. Out-of-state farmers are not eligible to receive any distributions from the Massachusetts Pricing Fund. Pet. App. A45-A47.[4]

[4] The total amount of milk produced by Massachusetts dairy farmers is roughly one-third the total volume of *Class I* milk sold

The operation of the Massachusetts Order may be understood by considering an example. Suppose the applicable blend price under Federal Order 1 is $12/cwt. The Massachusetts premium is one-third of the difference between $15 and $12, or $1/cwt. Under the Massachusetts Order, processors are required to pay this $1/cwt premium on all Class I milk they purchase for consumption in Massachusetts, including milk purchased from out-of-state farmers. If a processor sells 1 million cwt of Class I milk in Massachusetts each month, it is required to pay a premium of $1/cwt, or $1 million. Even if the processor purchases 100% of its milk from out-of-state farmers, it is required to pay a $1 million premium, and the $1 million is distributed solely to Massachusetts farmers.

3. Petitioners operate fluid milk processing plants in Massachusetts. Petitioner West Lynn Creamery buys approximately 97% of its milk from dairy farmers in New York and Maine; it buys the remaining 3% from farmers in Massachusetts. Petitioner LeComte's Dairy buys all its raw milk from West Lynn Creamery. Petitioners process the raw milk and sell fluid milk for consumption in Massachusetts. Pet. App. A3; Pet. 4.

Petitioners paid the Massachusetts premium in April and May 1992, but thereafter discontinued payments.

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by processors for consumption in Massachusetts. *See* Record of Proceeding Before the Commissioner of Food and Agriculture, Exh. EE, at 92 (Sept. 14, 1992). Accordingly, the amount distributed to Massachusetts farmers under the Order per hundredweight of milk produced is about three times the amount collected from processors per hundredweight of Class I milk sold. Thus, the "Massachusetts premium"—one-third of the difference between the federal blend price and $15—will result in an effective price to Massachusetts farmers of roughly $15/cwt. For example, if the federal blend price is $12/cwt, the Massachusetts premium will be $1/cwt, and the additional amount received by Massachusetts farmers under the Order will be roughly $3/cwt of milk production.

On July 24, 1992, petitioners filed an action in the Massachusetts Superior Court contending that the Pricing Order violates the Commerce Clause. Petitioners sought an injunction, declaratory relief, and damages. On July 31, 1992, the Superior Court denied petitioners' request for an injunction on the ground that they had not shown that they would be irreparably harmed in the absence of an injunction. Pet. App. A5-A6.

In June and July 1992, respondent initiated administrative actions against petitioners to suspend or revoke their licenses for failing to comply with the Pricing Order. Pet. App. A6. On November 16, 1992, respondent conditionally revoked petitioners' licenses. *Id.* at A27-A40. After the Superior Court denied petitioners' renewed request for an injunction, *id.* at A22-A24, a single justice of the Massachusetts Appeals Court issued an order staying the license revocations. *Id.* at A17-A21.

4. The Supreme Judicial Court of Massachusetts granted review on its own motion and held that the Pricing Order does not violate the Commerce Clause. Pet. App. A1-A13. The court acknowledged that the Commerce Clause "prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." Pet. App. A8 (quoting *New Energy Co.* v. *Limbach*, 486 U.S. 269, 273-74 (1988)). But the court concluded that "the pricing order does not discriminate [against interstate commerce] on its face, is evenhanded in its application, and only incidentally burdens interstate commerce." Pet. App. A9.

The court reasoned that the Pricing Order is "evenhanded in its design and effect" because "[a]ll milk dealers that sell Class I milk for consumption in Massachusetts are required to contribute to the fund." Pet. App. A9. The court also concluded that "[t]he pricing order does not establish a minimum price milk dealers must pay

for milk regardless of point of origin." *Id.* at A10. In support of that conclusion, the court noted that the Massachusetts premium is determined by the Massachusetts target price of $15, the federal minimum price, and the amount of milk the dealer sells for consumption in Massachusetts. *Id.*

The court further concluded that "[t]he pricing order is not an attempt to promote the sale of Massachusetts milk to the detriment of out-of-State producers." Pet. App. A10. Because "the premium required under the pricing order is independent of the price paid for the milk or its point of origin," processors "have every reason to seek out the lowest unit price for milk." *Id.*

The court assumed that petitioners have standing to argue that the Pricing Order prevents out-of-state farmers from competing with in-state farmers, but rejected that argument on the merits. The court was "not persuaded that the pricing order provides milk dealers an incentive to purchase milk from in-State producers rather than from out-of-State producers." Pet. App. A10.

Finally, the court assumed that petitioners have standing to argue that distribution of premium payments solely to in-state farmers is discriminatory and burdens interstate commerce. The court recognized that "[c]ommon sense necessitates" the conclusion that the fund distribution plan has an adverse effect on interstate commerce. Pet. App. A11. The court nevertheless held that "the burden is incidental given the purpose and design of the program," which is to provide "an infusion of capital designed solely to save an industry from collapse." *Id.*

The court distinguished this Court's decision in *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). In *Baldwin*, the State of New York prohibited processors from selling milk purchased from out-of-state farmers unless they paid the New York minimum price for the milk. The Massachusetts court concluded that the Massachusetts Pricing Order "cannot fairly be said to be discriminatory or protectionist as was the [law] at issue in *Baldwin*." Pet. App. A12.

SUMMARY OF ARGUMENT

The Commerce Clause limits the power of the States to discriminate against interstate commerce. This "negative" aspect of the Commerce Clause prohibits the States from engaging in economic protectionism—*i.e.*, in measures designed to benefit local economic interests at the expense of out-of-state competitors. A state law that amounts to simple economic protectionism is virtually invalid *per se* under the Commerce Clause.

1. The Massachusetts Pricing Order is an unconstitutional exercise in economic protectionism under this Court's seminal decision in *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935). In *Balwin*, the Court unanimously struck down a New York law that prohibited milk processors from selling milk purchased from out-of-state dairy farmers unless the processors paid the farmers no less than New York's minimum price for raw milk. The Court concluded that the law "set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported." *Id.* at 521. The Court held that the Commerce Clause prohibits States from enacting laws "with the aim and effect of establishing an economic barrier against competition with the products of another state." *Id.* at 527. The Court has relied upon and reaffirmed the principles of *Baldwin* in many subsequent cases.

a. Under *Baldwin* and subsequent decisions of this Court, a finding that state legislation constitutes economic protectionism may be based either on the purpose or the effect of the legislation. The purpose of the Massachusetts Pricing Order is to protect the Massachusetts dairy industry from assertedly "ruinous" price competition with

out-of-state dairy farmers. The Order itself, as well as respondent's findings in support of the Order, make clear that the State's purpose is to erect an economic barrier around Massachusetts farmers that prevents them from losing sales to more efficient out-of-state competitors. That is precisely the protectionist purpose that is forbidden under the Commerce Clause.

b. The Massachusetts Order has the same protectionist effect as the New York law struck down in *Baldwin*: it stifles price competition between in-state and out-of-state dairy farmers by setting a minimum price for Class I milk. Under the Massachusetts Order, processors who purchase milk from out-of-state farmers are required to pay a minimum price equal to the sum of the federal minimum price and the Massachusetts premium. As a result of the Massachusetts Order, processors no longer have the economic incentive or the ability to buy milk from out-of-state farmers who are willing to sell for less than the Massachusetts minimum price. Moreover, out-of-state farmers are prevented from reaping the rewards of their greater efficiency by making additional sales of milk for consumption in Massachusetts.

There is no basis for the Massachusetts Supreme Judicial Court's conclusion that the Massachusetts Pricing Order does not establish a minimum price for milk. *See* Pet. App. A41 ("This Order sets a target minimum price."). Under the Order, Class I processors must pay at least the sum of the federal minimum price plus the Massachusetts premium for out-of-state milk. It makes no difference that processors pay a uniform premium for in-state milk as well as out-of-state milk; uniform minimum price laws are unconstitutional under *Baldwin*.

2. The Massachusetts Pricing Order is also invalid under the Commerce Clause for an additional reason that was not present in *Baldwin*. The Massachusetts Order facially discriminates against interstate commerce by requiring processors to pay a premium for both in-

state and out-of-state milk, and then distributing the premium only to in-state dairy farmers. The Order thus provides a direct commercial advantage to Massachusetts dairy farmers, and deprives out-of-state farmers of the same advantage simply because they are located in other States.

The Massachusetts Order cannot be justified as a constitutionally permissible subsidy to state industry. Massachusetts has not appropriated funds from the state treasury to support local dairy farmers. Instead, Massachusetts requires milk processors to pay a premium to in-state farmers whether or not the processors buy in-state milk. The Massachusetts Order thus is an unconstitutional "regulation of interstate commerce" that is "designed to give its residents an advantage in the marketplace." *New Energy Co.* v. *Limbach*, 486 U.S. 269, 278 (1988) (emphasis omitted).

3. Both the purpose and the effect of the Pricing Order are nakedly protectionist; consequently, the Massachusetts court erred in applying the constitutional balancing analysis of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970). In any event, the Order is invalid even under *Pike*. The *Pike* analysis focuses on the nature of the local interest involved and whether it could be promoted as well with a lesser impact on interstate activities. The State interest involved is protection of local dairy farmers against out-of-state competition; Massachusetts does not even advance a noneconomic interest such as the protection of health, safety, or the environment. Moreover, the State's asserted interest in protecting its dairy industry could be promoted as effectively through direct subsidies to dairy farmers, tax relief measures, or state loan programs.

ARGUMENT

THE MASSACHUSETTS PRICING ORDER IS INVALID UNDER THE COMMERCE CLAUSE

The Commerce Clause provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several States . . . ." U.S. Const., art. I, § 8, cl. 3. "It is long-established that, while a literal reading evinces a grant of power to Congress, the Commerce Clause also directly limits the power of the States to discriminate against interstate commerce." *Wyoming* v. *Oklahoma*, 112 S. Ct. 789, 800 (1992) (citing authorities). "This 'negative' aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co.* v. *Limbach*, 486 U.S. 269, 273-74 (1988) (citing authorities). It is also well established that if a state law "amounts to simple economic protectionism," the Court applies "a 'virtually *per se* rule of invalidity.'" *Wyoming* v. *Oklahoma*, 112 S. Ct. at 800 (quoting *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978)).[5]

The Massachusetts Pricing Order at issue in this case is an exercise in economic protectionism. The Order has both the purpose and the effect of protecting the Massachusetts dairy industry from out-of-state competition. Accordingly, the Order is invalid under the Commerce Clause. *See Marigold Foods, Inc.* v. *Redalen*, Civ. No. 4-92-1084 (D. Minn. Oct. 20, 1993) (holding unconstitutional, on motion for preliminary injunction, Minnesota law substantively identical to Massachusetts Pricing Order).

[5] If "a statute has only indirect effects on interstate commerce and regulates evenhandedly," the Court has "examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 579 (1986) (citing *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

A. The Massachusetts Pricing Order Is Invalid Because It Amounts To Simple Economic Protectionism

1. In the leading case of *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), the Court struck down, as invalid under the Commerce Clause, a New York statute that "set up a system of minimum prices to be paid by dealers to producers." *Id.* at 519. Justice Cardozo's opinion for a unanimous Court recognized that the Commerce Clause did not prevent New York from setting a minimum price for milk that was both produced and consumed in New York. *Id.* (citing *Nebbia* v. *New York*, 291 U.S. 502 (1934)). But New York did not stop there. If the State had simply established a minimum price for New York milk, processors would have had an economic incentive to purchase milk at lower prices from dairy farmers in other States. "To keep the system unimpaired by competition from afar," New York decreed that "there shall be no sale within the state of milk bought outside unless the price paid to the producers was one that would be lawful upon a like transaction within the state." 294 U.S. at 519.[6]

The Court concluded that the New York law "set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported." *Id.* at 521. The Court observed that "[n]ice distinctions . . . between direct and indirect burdens" on commerce "are irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states." *Id.* at 522. The Court recognized that "[i]f New York, in order to

[6] The New York law at issue in *Baldwin* thus was facially "evenhanded" in its treatment of in-state and out-of-state milk. But contrary to the Massachusetts Supreme Court's conclusion, *see* Pet. App. A9, such "evenhandedness" did not save the law from constitutional attack.

promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation." *Id.*

The Court rejected the State's contention that the minimum price law was a permissible measure intended to ensure "a regular and adequate supply of pure and wholesome milk." *Id.* at 523. The Court concluded (*id.* at 527):

> What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. . . . Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin.

This Court has relied upon and reaffirmed the principles of *Baldwin* in many subsequent cases. In *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525 (1949), the Court held that a State may not block the expansion of a milk processing plant in order to reduce competition between in-state consumers and out-of-state consumers for locally produced milk. Justice Jackson's opinion for the Court observed:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

Id. at 539. In *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361 (1964), the Court invalidated Florida regulations that effectively reserved the market for Class I milk to in-state dairy farmers. The Court, observing that "[t]he principles of *Baldwin* are as sound today as they were when announced," *id.* at 375, ruled that "the State may not, in the sole interest of promoting the economic welfare of its dairy farmers, insulate the Florida milk industry from competition with other States." *Id.* at 377; *see also Limbach*, 486 U.S. at 275 (*Baldwin* is "the leading case"); *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 580 (1986) (citing *Baldwin* for the proposition that a State "may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess").[7]

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[7] *See generally* Richard B. Collins, *Economic Union As A Constitutional Value*, 63 N.Y.U. L. Rev. 43 (1988) (arguing the primary function of Commerce Clause is to promote a national common market); Earl M. Maltz, *How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 Geo. Wash. L. Rev. 47, 65 (1981) (arguing that Commerce Clause embodies principle that "individual businesspersons should be free to operate commercially in any state where such operations are legal and should not be denied access to markets or resources based upon that choice"); Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1245-57 (1986) (arguing that the Court's Commerce Clause decisions properly have been concerned with preventing States from engaging in purposeful economic protectionism); Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 Cal. L. Rev. 1203, 1204 (1986) (analyzing Commerce Clause cases and concluding that "discriminatory regulations are almost invariably invalid").

2. The Court's decision in *Baldwin* rested in part on the "avowed purpose of the obstruction . . . to suppress or mitigate the consequences of competition between the states." 294 U.S. at 522. Subsequent decisions of this Court establish that "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose, or discriminatory effect." *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 270 (1984); *see Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 333, 352-53 (1977).

In this case, as in *Bacchus Imports*, the Court "need not guess at the [State's] motivation." 468 U.S. at 271. The preamble to the Pricing Order states that its purpose "is to provide an immediate interim solution to the state of emergency facing the Massachusetts dairy industry" by setting "a target minimum price to be paid by milk dealers to Massachusetts producers, above the federally established minimum milk price." Pet. App. A41. The preamble further states that the purpose of the Order is to "stabiliz[e] the price producers are paid" at a level that "yield[s] a reasonable return" to Massachusetts farmers. *Id.* Moreover, the preamble expressly acknowledges that the "terms and conditions of the Order take into consideration the regional nature of the flow of milk." *Id.* Thus, the purpose of the Massachusetts Pricing Order is to protect Massachusetts dairy farmers from assertedly "ruinous" price competition with dairy farmers in other States.

Respondent's findings in support of the Pricing Order (Pet. App. A51-A57) confirm that its purpose is to protect the Massachusetts dairy industry from out-of-state competition. Respondent found that "we must act on the state level to preserve our local industry" and to "maintain reasonable minimum prices for the dairy farmers." *Id.* at A57. Respondent found that Massachusetts dairy farmers "lost an average of $2.86/cwt" in 1991. *Id.* at A53. Respondent concluded, "If no action is taken, the entire New England dairy industry will collapse and milk

will be imported from greater and greater distances." *Id.* at A55.[8]

The evidence concerning the State's purpose establishes that the Pricing Order is precisely the type of "parochial legislation" that the Court "has consistently found . . . to be constitutionally invalid." *Philadelphia* v. *New Jersey*, 437 U.S. 617, 627 (1978). "[I]t is irrelevant to the Commerce Clause inquiry that the motivation of the [State] was the desire to aid the makers of the locally produced [product] rather than to harm out-of-state producers." *Bacchus Imports*, 468 U.S. at 273. Similarly, it makes no difference that the preamble to the Order states (Pet. App. A41) that, as a result of the Order, "consumers will be assured of a local supply of fresh milk," because that very purpose was rejected as unconstitutional economic protectionism in *Baldwin*. *See* 294 U.S. at 522-23; *Philadelphia* v. *New Jersey*, 437 U.S. at 627. Moreover, the Order is not saved by respondent's determination that Massachusetts dairy farmers are facing an economic crisis. It is well settled that "the propriety of economic protectionism may not be allowed to hinge upon the State's—or this Court's—characterization of the industry as either 'thriving' or 'struggling.'" *Bacchus Imports*, 468 U.S. at 273.[9]

[8] The Supreme Judicial Court accepted these statements of purpose. Its opinion recites the preamble to the Pricing Order, Pet. App. A4-A5 n.8, and states that the purpose of the Order is "to boost the amount of money local dairy farmers—the producers—receive for milk above and beyond that required by the Federal program." *Id.* at A4.

[9] The same considerations rule out the possibility that respondent can validate the Pricing Order "by showing that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Limbach*, 486 U.S. at 278. As the Court noted, "[t]his is perhaps just another way of saying that what may appear to be a 'discriminatory' provision in the constitutionally prohibited sense—that is, a protectionist enactment—may on closer analysis not be so." *Id.* In this case, respondent has not even advanced a nonprotectionist purpose for the Order.

3. The Massachusetts Pricing Order, like the New York law struck down in *Baldwin*, effectively establishes a minimum price for out-of-state milk and thereby "strip[s] away" from out-of-state dairy farmers "the competitive and economic advantages [they have] earned for [themselves]." *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. at 351. The Commerce Clause prohibits States from engaging in such naked economic protectionism.[10]

The Massachusetts Pricing Order requires Class I processors who purchase milk from out-of-state farmers for resale in Massachusetts to pay a minimum price equal to the sum of the federal minimum price plus the Massachusetts premium. The Massachusetts premium plainly raises the total minimum price processors must pay for Class I milk, as well as the total minimum price that Massachusetts farmers receive for milk.[11] Under the Order, processors can no longer obtain milk from out-of-state farmers at the federal minimum price or at any privately negotiated premium less than the Massachusetts premium. By depriving processors of any economic incentive to buy milk from low-cost producers, the Order

[10] It is well established that a state regulation that on its face restricts both interstate and intrastate transactions may violate the Commerce Clause if it has the "practical effect" of discriminating against interstate sales. *Hunt*, 432 U.S. at 350; *Baldwin*, 294 U.S. at 522.

[11] The Massachusetts Order would be invalid even if out-of-state farmers received the Massachusetts premium on their sales for consumption in Massachusetts. *See Baldwin*, 294 U.S. at 521-22. As discussed below, *see* pp. 21-25, *infra*, the Order is invalid for the *additional* reason that premiums on out-of-state purchases are diverted to in-state farmers. The Massachusetts premium is not equivalent to an excise tax on raw milk because it is paid directly to dairy farmers. *See* Pet. App. A47 ("All amounts received pursuant to this Order shall be distributed . . . directly to Massachusetts producers . . . .").

insulates Massachusetts dairy farmers from competition with out-of-state dairy farmers.[12]

By the same token, the Order prevents out-of-state farmers from reaping the rewards of their greater efficiency by making additional sales to Massachusetts processors. The Massachusetts premium thus "has the same practical effect" as the New York law struck down in *Baldwin*: "processors will pay a minimum price . . . even when the milk is produced out-of-state. As a result, the incentive to purchase milk from out-of-state will be reduced." *Marigold Foods, Inc.*, slip op. at 13. *Accord Farmland Dairies* v. *McGuire*, 789 F. Supp. at 1254 (S.D.N.Y. 1992) (holding unconstitutional New York law requiring compensating payments to be made to in-state farmers if processor buys milk from out-of-state farmers at less than State's minimum price).[13]

[12] In *Adams* v. *Watson*, No. 93-1068 (1st Cir. Aug. 13, 1993), *withdrawn and vacated* (Sept. 23, 1993), the court initially held that certain out-of-state dairy farmers lacked standing to challenge the Massachusetts Order, based largely on the court's mistaken belief that the Order creates an economic incentive for processors to purchase *additional* out-of-state milk. The court incorrectly believed that disbursements to in-state farmers under the Order are based only on Class I processors' purchases of in-state milk; in fact, in-state farmers receive disbursements regardless of the existence or level of in-state purchases. After the parties filed a brief explaining this crucial error, the court withdrew its opinion and vacated its judgment.

[13] The *Farmland Dairies* decision made clear that the impact of the New York system was not, as the Massachusetts Supreme Court misperceived, *see* Pet. App. A12 n.14, to favor the purchase of New York milk, but rather to equalize the minimum cost of New York and out-of-state milk by applying the same minimum price to both. The New York regulation "establish[ed] a minimum price of $13.85 per hundredweight for New York-produced Class I fluid milk," and provided that "all milk produced outside New York State and distributed within the State as Class I fluid milk shall be subject to the application of a compensatory payment as the Commissioner determines necessary to *equalize cost for such milk* among licensed milk dealers." 789 F. Supp. at 1247 (emphasis added)

For example, suppose the federal minimum price for Class I milk is $14/cwt, and out-of-state farmers are willing to sell milk at a negotiated premium of $.50/cwt over the federal minimum price. Absent the Massachusetts Order, processors have an economic incentive to buy milk at the lowest price available. If Massachusetts dairy farmers cannot meet the $14.50 price, processors will make additional purchases of milk from out-of-state farmers. Under the Pricing Order, however, processors must pay $15/cwt for out-of-state milk (the federal minimum price of $14 plus a Massachusetts premium of $1, assuming a federal "blend" price of $12/cwt). The Order is invalid under the Commerce Clause because it "remove[s] any economic incentive for a local distributor to purchase out-of-state milk." *Polar Co.* v. *Andrews*, 375 U.S. at 376. Indeed, the Order denies out-of-state milk "an equal opportunity to compete with [in-state] milk to the extent that the out-of-state supply [bears] additional transportation charges." *Id.*

For these reasons, the Massachusetts Supreme Judicial Court was flatly wrong in concluding that "[t]he pricing order does not establish a minimum price milk dealers must pay for milk regardless of point of origin." Pet. App. A10. In support of that conclusion, the court observed (Pet. App. A10) that the Massachusetts premium is determined by (1) the Massachusetts target price, (2) the federal minimum price, and (3) the amount of milk sold for consumption in Massachusetts. The court's conclusion is a *non sequitur*. Although the Massachusetts premium is determined by a formula that does not refer to the actual price paid for out-of-state milk, the fact remains that the Order requires processors to pay the federal minimum price plus the Massachusetts premium

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(citation omitted). The New York system thus did precisely what the Massachusetts Pricing Order does: establish a minimum price equally applicable to in-state and out-of-state milk.

for out-of-state milk. Processors are free to pay more; they cannot pay less.

The court also observed that the Massachusetts premium is "independent of the price the milk dealer has paid for the milk or the milk's point of origin," and therefore "does not manifest any preference for in-State milk over out-of-State milk." Pet. App. A10. Again, the court's conclusion does not follow from its premises. A uniform minimum price is still a minimum price, and *Baldwin* established that state laws setting uniform minimum prices are invalid under the Commerce Clause regardless of whether they establish a "preference" for in-state milk.[14]

B. The Massachusetts Pricing Order Is Invalid Because It Facially Discriminates Against Interstate Commerce

The Massachusetts Pricing Order violates the Commerce Clause for an additional reason that was not present in *Baldwin*. Under the New York law at issue in *Baldwin*,

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[14] The Massachusetts court did not rely on *Henneford* v. *Silas Mason Co.*, 300 U.S. 577 (1937), and that case provides no support for respondent. *Henneford*, decided two years after *Baldwin*, upheld the validity of a use tax imposed by the State of Washington on goods purchased in other States. Justice Cardozo, who wrote the Court's opinion in both cases, noted that the cases were "far apart." 300 U.S. at 585. In *Henneford*, the State merely eliminated an advantage that accrued to out-of-state sellers because in-state sellers were subject to a state-imposed sales tax. Out-of-state sellers retained whatever competitive advantages they might have had as a result of greater efficiency. But in *Baldwin*—as in this case—the State established a minimum price that eliminated all price differences, including differences resulting from the greater efficiency of out-of-state farmers. *See* Regan, *supra* note 7, at 1245-57. In addition, the proceeds of the tax in *Henneford* raised revenue for the State. In *Baldwin*—as in this case—the difference between the market price and the State-imposed price does not go into the State treasury, but instead goes directly to dairy farmers. (Indeed, this case is worse than *Baldwin* because the differential goes only to *in-state* farmers.)

out-of-state farmers received the difference between the New York minimum price and the price they would have received in the absence of the New York law. In contrast, the Massachusetts Order requires processors to pay a premium for both out-of-state milk and in-state milk, but distributes the premium only to in-state dairy farmers. The Massachusetts Order thus does more than simply "level the playing field." *Marigold*, 809 F. Supp. at 722. It provides a direct commercial advantage to Massachusetts farmers, and explicitly deprives out-of-state farmers of payments from the Fund simply because they are located in other States. The Pricing Order thus on its face "violate[s] the cardinal requirement of non-discrimination." *Limbach*, 486 U.S. at 274.[15]

Because the premium is distributed only to Massachusetts farmers, the Massachusetts Pricing Order is similar to a state tax levied on interstate sales but not on intrastate sales. *See Armco, Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984) ("State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State"). Indeed, it is even worse, because Massachusetts farmers receive the proceeds from the Massachusetts premium on interstate sales. In

[15] Petitioners plainly have standing to challenge the distribution of the Massachusetts premium only to in-state farmers. First, petitioners are required to pay the premium. In analogous circumstances, the Court held that wholesalers who paid a liquor tax had standing to challenge the tax despite the State's argument that they had not shown any economic injury. *See Bacchus Imports*, 468 U.S. at 267. Second, petitioners purchase 97% of their milk from out-of-state dairy farmers. Pet. 4. If out-of-state farmers were eligible to receive the Massachusetts premium, they could afford to charge petitioners less for milk. Consequently, the distribution of premiums only to in-state farmers causes petitioners to pay more for out-of-state milk. As a result: (1) petitioners have suffered a concrete and particularized injury in fact; (2) there is a causal connection between the injury (higher prices) and the petitioners would be redressed by a favorable decision. *See Lujan* discriminatory nature of the payments, and (3) the injury to v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

effect, Massachusetts farmers share in the proceeds of all sales by their out-of-state competitors.

Again, an example is helpful. Suppose the federal Class I minimum price is $14/cwt, the federal blend price is $12, and processors are paying dairy farmers a negotiated premium of $.50/cwt in the absence of the Massachusetts Order. Under the Federal Milk Marketing Order System, Class I processors will pay $14.50/cwt (the $14 federal minimum price plus the $.50 negotiated premium) for both in-state and out-of-state milk; both in-state and out-of-state farmers will receive $12.50/cwt (the $12 federal blend price plus the $.50 negotiated premium). As a result of the Massachusetts Order, (1) Class I processors will be required to pay at least $15/cwt ($14/cwt plus a $1/cwt Massachusetts premium), and (2) in-state farmers will receive at least $15 (the $12 federal blend price plus a $3 distribution under the Massachusetts Order).[16] Because out-of-state farmers receive nothing from the Massachusetts Fund, they would have to *negotiate* a premium of $3/cwt in order to match the in-state farmer's minimum total compensation of $15/cwt. But in that case, the price to the processor for out-of-state milk would be $*18*/cwt ($14 federal minimum price plus $1 Massachusetts premium plus $3 negotiated premium)—far above the $15 price to the processor for in-state milk. And an out-of-state farmer who meets the $15 price will receive only $12/cwt (the federal blend price), far less than the $15 his in-state competitor receives. The Massachusetts Order thus discriminates against out-of-state dairy farmers in favor of in-state farmers.

The Massachusetts Order cannot be justified as a constitutionally permissible "subsidy" to Massachusetts dairy

[16] See note 4 *supra* (explaining why a Massachusetts premium of $1/cwt results in a distribution of roughly $3/cwt to Massachusetts farmers).

farmers.[17] It is true that "[d]irect subsidization of domestic industry does not ordinarily run afoul of [the Commerce Clause]." *Limbach*, 486 U.S. at 278. That is so because States generally may "limit[] benefits generated by a state program to those who fund the state treasury." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 442 (1980). But the Massachusetts premium is far from a "subsidy"—*i.e.*, "a grant of funds or property from a government . . . to a private person or company . . . as a simple gift or a payment of an amount in excess of the usual charges for a service . . . ." Webster's Third New International Dictionary 2279 (1968). Massachusetts has not appropriated funds from its treasury as a "simple gift or payment" to its farmers. Instead, it has ordered milk processors to remit funds, based on their purchases of milk, for distribution to in-state farmers. The Pricing Order thus regulates interstate commerce by setting a minimum price for out-of-state milk and diverting part of the proceeds of sales of out-of-state milk to in-state farmers. Under the Commerce Clause, a State may not pursue the legitimate goal of encouraging domestic industry by "the illegitimate means of isolating the State from the national economy." *Philadelphia* v. *New Jersey*, 437 U.S. at 627.[18]

[17] The Massachusetts court did not discuss or rely on this argument. A federal district court erroneously relied on it in sustaining the constitutionality of a somewhat different law in Maine. *See Cumberland Farms, Inc.* v. *Lafaver*, Civ. No. 92-70-P-H (D. Me. Aug. 3, 1993). In any event, the Maine law differs from the Massachusetts Order in that it regulates the retail price of milk. In addition, no Federal Order applies to milk sales in Maine, and the *Cumberland Farms* court concluded that the minimum price for out-of-state milk is lower than the minimum price for milk produced in Maine.

[18] In *Limbach*, the Court struck down as violative of the Commerce Clause an Ohio law that awarded a tax credit against the Ohio motor vehicle fuel sales tax for ethanol sold by fuel dealers, but only if the ethanol was produced in Ohio or in a State granting similar tax advantages to ethanol produced in Ohio. The Court acknowledged that Ohio probably could have provided a direct subsidy to its own ethanol producers—as, indeed, did Indiana, where the ethanol producer challenging the Ohio law was located. 486 U.S. at 278. But a State's ability directly to subsidize its residents did not justify the Ohio statute, which attempted to achieve its goals through improper regulation of interstate commerce. *Id.*

Similarly, the "market participant doctrine" plainly has no application here. Under that doctrine, when a State chooses to engage in commercial activity, its business methods are of no concern under the Commerce Clause even if they favor the State's residents. *See Reeves*, 447 U.S. at 438-39; *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794, 806-10 (1976). The Court has rejected the contention that any state program that has the purpose and effect of supporting state industry is "a form of state participation in the free market." *Limbach*, 486 U.S. at 277. The Pricing Order is a typical form of government regulation of business. In this case, as in *Limbach*, the State's role "cannot plausibly be analogized to the activity of a private purchaser." *Id.* at 278.

C. The Massachusetts Pricing Order Is Invalid Under the Balancing Analysis of *Pike* v. *Bruce Church*

The Massachusetts Supreme Judicial Court incorrectly concluded that the Pricing Order is subject to the balancing analysis of *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). As we have explained, *see* pp. 12-25 *supra*, the Massachusetts Order is nakedly protectionist in purpose and effect, and therefore is subject to much stricter scrutiny. In any event, the Order is invalid even under the *Pike* analysis.

The *Pike* analysis turns on "the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 142. The local interest in this case is protection of the Massachusetts dairy industry. Massachusetts does not even assert that it is advancing a noneconomic interest such as the health or safety of its citizens, *see Mintz*

v. *Baldwin*, 289 U.S. 346 (1933), environmental protection, *see Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), or the prevention of fraud, *see California* v. *Thompson*, 313 U.S. 109 (1941). Instead, the State acknowledges that it is seeking to advance local economic interests by insulating Massachusetts farmers from price competition with out-of-state farmers. "Shielding in-state industries from out-of-state competition is almost never a legitimate local purpose." *Maine* v. *Taylor*, 477 U.S. 131, 148 (1986).[19]

Even when a State enacts a law pursuant to its "unquestioned power[s]," the law is invalid under the *Pike* balancing test if "adequate and less burdensome alternatives exist." *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U.S. 366, 373 (1976). The Massachusetts Pricing Order plainly fails that test. The State's interest in protecting its dairy industry could be promoted as effectively through a variety of actions that would not harm interstate commerce as severely as the Pricing Order. For example, the State could subsidize its dairy farmers out of its general revenues. Or it could grant relief from state income taxes or local property taxes to in-state dairy farmers. Beyond that, the State could arrange direct or guaranteed loans to dairy farmers to provide capital for investments that would increase the productivity of Massachusetts dairy farmers. In view of the options available to Massachusetts, the burden on interstate commerce that results from its decision to insulate Massachusetts dairy farmers from competition exceeds the benefit to the local dairy industry.

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[19] Even if the State had asserted a noneconomic interest, this Court would not necessarily have accepted that assertion at face value. It is a "rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods." *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 (1951). And "[t]he commerce clause forbids discrimination, whether forthright or ingenious." *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455 (1940).

CONCLUSION

The judgment of the Supreme Judicial Court of Massachusetts should be reversed.

Respectfully submitted.

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